



No. 379

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In the Supreme Court of the United States

October Term 1947.

GRAND RIVER DAM AUTHORITY, *Petitioner,*

vs.

GRAND-HYDRO, *Respondent.*

BRIEF FOR THE RESPONDENT IN ANSWER TO BRIEF
FOR THE UNITED STATES, *AMICUS CURIAE.*

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Argument.

The brief for the United States advances two propositions. The first (p. 11) is identical with the propositions relied upon in the petition for writ of certiorari and the brief in support thereof, and is to the effect that the Supreme Court of Oklahoma wrongfully held that the respondent legally could have put its land to power project use. Respondent's brief in opposition, heretofore filed, shows at pages 6 to 9, inclusive, that the Oklahoma court has not held that respondent could build a dam without authorization from the Federal Power Commission, but has simply held that respondent is entitled to just compensation, according to the meaning of that term in the Constitution of the State of Oklahoma, even though respondent had no Federal authorization to construct a project.

The second point advanced by the United States (p. 14) consists of two arguments: The first, that the doctrine

of the *Chandler-Dunbar* case¹ prohibits consideration of adaptability for dam site use in fixing the value of respondent's lands, and the second seems to amount to the proposition that the expression of an opinion by a witness as to the value of this land, making due allowance for its adaptability to use as a dam site, amounts to nothing more than a capitalization of prospective revenue, and since prospective revenue could not become an actuality without a Federal license the value which the witness ascribes to the land must in law be ascribed to the license.

With respect to the Government's argument predicated upon the *Chandler-Dunbar* case: The Government attempts to apply the doctrine of that case to a non-navigable stream, the flow of which affects navigable waters. The brief for the United States asserts that this court found it unnecessary to pass upon this contention in the case of *United States, ex rel. T. V. A., v. Powelson*, 319 U. S. 266. It is quite apparent that the United States, acting as condemnor in the *Powelson* case, was attempting to cause the amount of compensation to be fixed as if the involved land were nothing more than wild mountain land, without adaptability or availability for water power project use. This court, however, held that the determination of the amount of compensation should not be thus rigidly limited, saying that the owner was entitled to the market value of the property fairly determined, provided that the landowner's possession of the power of eminent domain, so far as practicable, should not be permitted to affect the fixing of compensation.² While this court did not expressly pass upon the

A typographical error occurs in the brief heretofore filed by respondent in opposition to the petition for writ of certiorari. On page 15, lines 5 and 6, the word "respondent" should be "petitioner."

1. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

2. 319 U. S., at page 285.

question presented by the contention of the Government based upon the *Chandler-Dunbar* case, yet the opinion of this court and its subsequent denial of a petition for certiorari in the same case resulted in a remand of the proceedings to the trial court with directions that the landowner could prove his water power value subject only to the limitation above indicated. If in that case, in which the United States itself was the condemnor and was acting in the execution of express and direct authorization from the Congress of the United States, and where also the forum for trial and decision was the federal forum and not the state forum, this court was unwilling to adopt the Government's argument that Mr. Powelson had no right to have the value of his land determined in the light of its adaptability to a dam site, it is difficult to understand why Government counsel hopes that the court will consider the same contention in the present case.

The petition in condemnation (R. 32) fails to set forth averments essential to the adjudication sought by the United States. There is no allegation that the condemnor had filed a declaration of intention with the Federal Power Commission, that it had applied for a license or that it had obtained or would obtain a license from the Federal Power Commission; that the construction of a project upon the condemnee's land would affect the navigable capacity of the Arkansas River; that the Federal Power Commission had determined that such construction would affect such navigable capacity, or that the Grand River was either navigable or non-navigable. The petition in condemnation initiated and now supports only a taking by a state-created and state-owned agency, acting solely in that capacity. No at-

tempt has ever been made by the petitioner to broaden the limits of the original condemnation proceeding so as to create a basis for the claim, now made, of a superior Federal interest.

Thus the effect of the brief filed on behalf of the United States is to urge that the state agency, although proceeding strictly as such and not as a Federal licensee, is entitled to appropriate the respondent's land at the same low figure that it is claimed that the land would be worth in a proceeding brought directly by the United States itself in the very exercise of its regulatory powers. A judgment embodying or adopting this argument would seem to be a nullity, inasmuch as it will have no support in the pleadings, which fail to show any interest in the United States in the property. Surely the petitioner is not entitled to take credit, against the amount fixed by the jury as just compensation, for the claimed superior easement or regulatory power or title of the United States Government, when not only does the petition in condemnation fail to aver the existence of such outstanding power or title, but also fails to aver that the petitioner has any connection with the holder of the alleged outstanding power or title.

If it be urged that the United States is not to be prejudiced by the failure of the petitioner to make the petition in condemnation sufficiently broad, it should be pointed out that the United States Government has been in close contact with this whole development, as a lender and giver of money and as the grantor of the license under the Federal Power Act, and has had ample opportunity through many years to take steps to intervene, to bring about an amendment of the pleadings or to take such other action as would have created a proper basis for the arguments which it now makes.

The instant case was not filed in the exercise of the regulatory power of the United States Government nor of any other power of the United States Government. The United States is not a party. The very power of condemnation exercised herein is that bestowed by the State of Oklahoma by the Grand River Dam Authority Act and not that bestowed by the United States by the Federal Power Act; the case was filed before the Federal license was issued to the petitioner.

The *Chandler-Dunbar* case itself sufficiently distinguishes cases between riparian owners on non-navigable streams and the very language of that opinion indicates that the Government's contention here should be rejected. It seems to us unnecessary to discuss the significant difference between navigable and non-navigable streams.

The Government's brief asserts that the respondent has constructed a "hypothetical plant" and that the claimed value of the land is of necessity arrived at by a capitalization of earnings. (p. 9) This line of argument must be rejected because (a) the state court overruled objections to this evidence and has held that the same is competent and this decision will not be reviewed by this court,⁴ and (b) the evidence actually was not speculative; there was no "hypothetical plant"; there was no capitalization of earnings. The record in this case in this respect bears no resemblance to the record in the *Powelson* case.

The Government's brief has further argued that a capitalization of earnings here is nothing more than a capitalization of the license which would have to be issued by the Federal Power Commission before the project could

4. Cf. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 294, 85 L. ed. 836, 841.

be built. Such reasoning disregards both the fact of value and the amount of value, which were attested by the opinions of competent witnesses (R. 324, 346, 362, 379), and seeks to substitute an erroneously reasoned conclusion in the place of a fact proven by evidence and established by verdict. We suppose that the Government would say that the value of a vacant lot in a business district, because of its adaptability as the site for an office building, represents a capitalization of the building permit which is the *sine qua non* of the completed structure; that the valuation of the high point of land, taking into consideration its uniqueness and adaptability as a site for a television or FM radio broadcasting station, represents a capitalization of a license from the Federal Communication Commission; that the valuation of a quarter-section of land in Oklahoma, known to have oil under it, in the light of its oil bearing potentialities, represents a capitalization of the permit for drilling which is the *sine qua non* to development for oil purposes, etc, etc. The amount of the verdict in this case was not a capitalization of the license, and the value existed whether or not a license was issued.

We understand that the filing of the brief on behalf of the United States, *amicus curiae*, in support of the petition for writ of certiorari, does not have the effect of increasing the number or scope of the points presented by the petition itself. It appears that the petition is narrower than the brief for the United States in that the former seems to be confined to the argument that the Oklahoma Supreme Court wrongfully held that the respondent had the right to develop this project without a Federal license. This contention appears to be groundless because the Supreme Court of Oklahoma did not so hold. Attempts to raise any further

points, not found in the petition for writ of certiorari, must, we submit, be rejected.

The brief for the United States contains an occasional erroneous statement, e. g.: "The \$663,750 and other similar amounts will be paid to a landowner which otherwise could have realized such sums, if at all, only if it or its grantee should construct a hydro-electric project similar in size and capacity to the project constructed by the Authority." (p. 8) This statement overlooks the fact that the property has this value even though the land actually is never put to this use. This value could be realized by sale or could be retained without sale. The possession of a Federal license was not necessary in order for the respondent or a successor in title to realize or retain the value of the land.

The Government elsewhere argues that it is against the interest of the power consuming public and the Government of the United States to permit an award to stand "based on hypothetical power plant value." (p. 9) We have pointed out that the value fixed here is not hypothetical. We believe that ~~grave error will be committed~~ in stretching out the tenuous logic of the Government's brief to the point of disregarding a known and important fact, namely, that the land was adaptable as a dam site and by far its greatest value was for use in that way. Since it actually had that value, not only the Constitution of the State of Oklahoma but also the Constitution of the United States guarantees the payment of that value to the owner, however great it is and however inadvisable or costly it may make proposed Government action.

The argument of the Government's brief that looks forward to the expiration of petitioner's license at the end of

fifty years has been fully answered in the case of *United States v. Central Stockholders Corporation*, 52 F. (2d) 322.

The Government's brief freely concedes that the meaning of "just compensation" as used in the Oklahoma courts is, of course, a purely local question. (p. 12) We submit that the petition for writ of certiorari here presents only a purely local question which was properly decided and the petition should be denied.

Respectfully submitted,

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